Bulk Transport Service, Inc. *and* **Stephen A. Hunt.** Case 1-CA-19033

10 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 16 March 1983 Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was conducted in Boston, Massachusetts, on January 13, 1983, on complaint issued on February 22, 1982, alleging an unlawful threat to a shop steward in October 1981 and an unlawful discharge of Charging Party Stephen A. Hunt on August 25, 1981. While there are a number of serious issues present in the discharge portion of the case, e.g., whether Charging Party is an employee or independent contractor, whether his activity was concerted, the principal—and in this case dispositive—issue concerns Respondent's motivation for eliminating Charging Party's job and terminating his employment. For reasons set forth below, I find and conclude that no threat was made on October 1981 and that the sole and exclusive reason for the August 25 termination was one of operational economics, unrelated in whole or in part to any grievance activity on the part of Charging Party. Accordingly, the complaint is dismissed in its entirety.

Upon the entire record, including my observation of witness demeanor, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, Respondent at the hearing admits, and I find that Respondent is an employer within the meaning of the Act.

II. LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent at the hearing admits, and I find that Local 42 is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Termination of Charging Party on August 25, 1981*

The *relevant* facts here are simple and to a large extent undisputed.

Respondent Bulk Transport Service, Inc., and its affiliates have engaged in the trucking business and have been signatory to labor agreements with various Teamsters locals for more than 30 years. This case concerns one of its operations in which it hauls bone from Eastman Gelatin's plant in Peabody, Massachusetts, to Eastman Kodak's Rochester, New York, plant. The run begins in Peabody, where Respondent's trucks are weighed, loaded with bone, and reweighed; it proceeds to Rochester where the shipment is unloaded; and, after a layover in Rochester, it ends back at the Peabody plant.

Prior to September 1979, Respondent's drivers would perform all truck functions at the Peabody plant (weighing the truck, covering the load with canvas, and preparing shipment papers), except the actual loading of the truck, which was performed by employees of Eastman. Similarly, unloading was performed by Eastman's employees in Rochester. At that time, Eastman required that trucks be loaded during the night shift and unloaded in Rochester after 3 p.m. Since the running time to Rochester is 10 hours, drivers often would arrive well before 3 p.m. and be required to wait several hours before the trucks could be unloaded. To avoid such unnecessary waiting time, Respondent decided to employ a yardman at the Peabody plant who would perform all the duties previously performed by the drivers. In that way, a driver's tour of duty would be reduced by several hours, since he could now pick up loaded truck at a later hour so as to allow for a 3 p.m. arrival in Rochester and a prompt unloading. Moreover, there would be less likelihood that the Department of Transportation's general 60-hour-per-week rule for drivers would be violated.

Respondent's use of a yardman at the Peabody plant continued through August 25, 1981, at which time the position was discontinued for two reasons: one, the relaxation by Eastman of the "after 3 pm" unloading requirement; and the other, the assertion by Respondent's drivers, for the first time, of contract claims for waiting time

pay at the rate of $8 per hour. The former permitted Respondent's drivers to arrive in Rochester at any hour for prompt unloading and thus eliminated the possibility of excessive waiting time in Rochester. The latter posed for the first time the threat of substantially increased operating costs by way of driver claims for waiting time, which historically were considered to be included in the flat trip rate paid the drivers under the labor contract. As credibly explained by Respondent's president, Smith, the labor contract provided for the payment to the drivers of a percentage (27 percent) of the tariff rate for the Peabody-Rochester-Peabody trip, which included 1-1/2 hours of waiting time or delays on each end of the trip. Excess delays and those due to breakdowns and impassible highways were to be compensated for at an hourly rate. Respondent and its drivers operated on this basis until August 1981. At that time, a large number of grievances for waiting time pay were presented to Smith by Local Union President Salemme. At an August 25, 1981 meeting, Smith, replying to the drivers' grievance, said, "If I'm going to pay waiting time, I'll take the yardman off." Smith did so and told Salemme that his reason was "economics." The resultant savings, in Smith's judgement, were obvious and considerable: the drivers again would be performing the yard work at the Peabody plant at no extra cost to Respondent (the loading operation usually took no more than the 1-1/2 hours of free waiting time build into the flat trip rate) and the expense of a yardman (24 hours per week at $8 per hour plus fringes and FICA payments) would be eliminated. The position of yardman has *not* since be reestablished and drivers continue to perform those duties which they had performed prior to September 1979.

The General Counsel contends, however, that Respondent's elimination of the position and the termination of Charging Party on August 25 were for a wholly different reason: Charging Party's prosecution of a claim for Memorial Day 1981 holiday pay under the contract. That claim was orally made in early June 1981 and was denied because he was not considered to be in the bargaining unit and was therefore not entitled to the contract holiday pay. The claim again was pressed by Salemme and was denied in writing on the ground that he was an hourly employee not covered by a contract which by its terms applied only to drivers earnings a flat trip rate. The claim then was enlarged to include unpaid contributions to the health and welfare fund. Some time later, when Salemme learned (and received verification from Charging Party) that Charging Party was paid by Respondent on the basis of "bills" submitted by him sometimes 4 to 5 weeks after the work was performed and when he considered that the contract did not cover hourly employees, he dropped Charging Party's grievance. Thereafter, the grievance, enlarged again to include the August 25 discharge, was reduced to writing for the first time; an unfair labor practice charge was filed by Charging Party against the Local Union on September 2, 1981, alleging a failure to represent and, 2 weeks later, was withdrawn; a civil action was filed by Charging Party in the United States District Court seeking to enjoin the Union from removing Charging Party from the Union (thus having the effect apparently of rendering him ineligible to run for office in the December 1981 election) and was settled; and information concerning the Union's failure to represent Charging Party was submitted by him to the Labor Department which previously, on Charging Party's complaint, had asserted jurisdiction over the conduct of the previous as well as the upcoming union election. Notwithstanding this activity, Respondent has never been asked by the Union to arbitrate Charging Party's grievance and charging party has taken no action, under the Act or otherwise, to compel the prosecution of his grievance by the Union. His stated reason: the present proceeding against Respondent will afford him all the relief he seeks and, in any event, a failure to represent charge is "hard to prove" and would be "mean."

The General Counsel's contention as to Respondent's unlawful motive is a terribly strained one and finds absolutely no support in this record. First, there is no evidence of union animus on Respondent's part. On the contrary, the record reflects that it has had a Teamsters relationship for more than 30 years and that it took no action against its drivers who were, at the same time as Charging Party, prosecuting a large number of their own grievances for pay for waiting time. Those grievances were settled amicably without the need for arbitration. Second, Respondent became aware of Charging Party's grievance for holiday pay early in June, almost 3 months before the yardman position was eliminated. Had Respondent wanted to rid itself of Charging Party's for having filed a grievance, it would have done so long before August 25. Third, Charging Party was not discharged; rather, the position which he held was abolished when Respondent made a business decision to return permanently to a practice which it had followed in the past. And fourth, there is no history of past animosity between Respondent and Charging Party. The best that can be said is that Respondent's decision to eliminate the yardman position and return to its prior practice happened to be made at a meeting in which Charging Party's grievance was discussed secondarily, however, to the primary discussion of the many driver claims for waiting time pay. It was the latter grievances, those of the drivers, that brought forcefully home to Respondent the absurdity of paying for a yardman to perform work for which the drivers already were being paid. The General Counsel confuses the economic lessons learned by Respondent from those driver grievances with a motive on its part to punish Charging Party for having pursued a grievance for 1 day's pay and benefits for a several month period of time.

This essential distinction becomes even clearer when it is seen that Respondent's defense of Charging Party's grievance clearly was a reasonable one. Charging Party was "hired" by the shop steward; he never spoke with anyone from Respondent about the position, or its terms and conditions. Charging Party at no time knew who, if anyone, was his supervisor. The method by which he was compensated was unusual and was selected by Charging Party himself; he completed a form designed for use by drivers to report their trip and delay time charges and submitted it every few weeks (often as infre-

quently as 4–5 weeks). No company official was aware of his employment and the payroll office routinely paid charging party on the basis of those bills, withholding for taxes, and other normal payroll items. Prior to Memorial Day 1981, Charging Party regularly submitted bills, and was paid, for contract holidays not worked, even though Charging Party, for a part of the time, was a full-time employee of another contract signatory and received identical benefits from it. When Charging Party's claim for Memorial Day pay came to the attention of President Smith, he noted that the contract covered only drivers who were to be paid on a flat trip rate, that Charging Party was not licensed as a driver and, hence, could not perform the duties of a driver, and that Respondent had mistakenly been paying Charging Party and his two predecessors contract rates and benefits. Respondent's position from the outset that Charging Party's grievance would have to be arbitrated was a perfectly reasonable one and, indeed, the Union, which never has asked Respondent to arbitrate the issue, apparently agrees with that position.

Assuming without deciding that Charging Party was an employee within the meaning of the Act and that his grievance activity was concerted and thus protected, I nevertheless find and conclude that the elimination of his position and his termination on August 25, 1981, was wholly for economic reasons, unrelated in any sense and to any degree to his grievance activity, and that Respondent would have taken the identical action regardless of any grievance activity on Charging Party's part. Accordingly, this portion of the complaint must be dismissed.

Where a factual dispute exists, I have credited the testimony of President Smith, Local Union President Salemme, and senior driver Bernier. Based on my observation of their demeanor on the witness stand, I was convinced that the testimony of each represented a reliable account of the relevant events. On the other hand, based on my observation of their demeanor on the stand, I was of the firm belief that both Charging Party and Shop Steward Benson (running mates on a slate campaigning at the time of these events to unseat Salemme) appeared more interested in politically discrediting Salemme as to his handling of grievances than in giving an accurate account at the hearing of the facts relevant to this narrow unfair labor practice charge.

B. *The October 1981 Threat to Benson*

As to this allegation, the General Counsel offered the testimony of Shop Steward Benson and Union President Salemme. Benson testified that, at the October 1981 grievance meeting at which Salemme and Smith settled the driver grievances and agreed to disagree as to Charging Party's grievance, Smith said to him that he (Benson) would "rue the day" he took up the grievance for Charging Party. He testified that Salemme was an arm length away and heard the remark. Salemme testified that no such remark was made. For reasons set forth above, I am unable to credit the testimony of Benson. The General Counsel having failed to establish in his case in chief that such a threat was made, the complaint in this respect must be dismissed.

ORDER[1]

It is ordered that the complaint be dismissed.

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.